Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C.W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN,

Petitioners,

v.

WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CLYDE WILSON, and HAGANS & SYDOW,

Respondents.

On Petition For Writ Of Certiorari To The Fourteenth Court Of Appeals Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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1998

PARTIES TO THE PROCEEDING

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STATEMENT OF THE CASE

Petitioners seek this Court's review of a decision by the Fourteenth Court of Appeals of Texas finding that Petitioners waived most of their arguments on appeal by failing to support the legal and factual assertions in their brief with adequate record citations. The court of appeals granted Petitioners numerous extensions of time, both to file their brief and also to supplement the appellate record, and even allowed Petitioners to amend their brief. When Petitioners still failed to meet the minimum briefing requirements of the Texas Rules of Appellate Procedure, the court found that Petitioners had waived review of their unsupported points of error. In doing so, the court also declined to allow Petitioners a *second* opportunity to rebrief. The Fourteenth Court was fully within its discretion in thus disposing of Petitioners' appeal.

Petitioners have presented to this Court no question of federal law, no circuit conflict as to any issue, nor any conflict with the decisions of this Court. Petitioners can only hope to manufacture a constitutional issue by mischaracterizing, both legally and factually, the proceedings below. This case, however, presents nothing more than a question of state appellate procedure and is thus inappropriate for this Court's certiorari jurisdiction.

A. The petition misrepresents the Texas court of appeals' disposition of the case.

The Fourteenth Court of Appeals of Texas dismissed the majority of Petitioners' points of error because of the

fundamental insufficiency of the record citations in Petitioners' original and amended appellate briefs. App. A, at *2-3 ("Appellants wholly fail to adequately present their contentions on appeal.").[1] Yet, Petitioners argue throughout their Petition as if the appellate court's decision were based on insufficiencies in the *record itself*. Pet. at 6-8, 12-14, 24-26. The court of appeals, however, clearly explained that record insufficiency was not the basis for its decision. *See Bair v. Hagans*, 1997 WL 280451, at *3 n.1 ("Several of the Appellees argue that even after being allowed to supplement the record three times, [Petitioners] still failed to include items necessary for our review. *We do not reach these contentions.*") (emphasis added).[2] Second, in their zeal to complain about the appellate court's so-called "death penalty" sanctions, Petitioners gloss over the fact that the court did not base its entire disposition on waiver. The court of appeals found that Petitioners managed to support *one* subsection of their brief, devoted to malicious prosecution, with both record citations and legal authority. App. A, at *3 ("Only one of the subsections in this section of [Petitioners'] brief, a discussion of malicious prosecution against [Respondents], contains citations both to the appellate record and to relevant legal authority."). Reaching the merits of that issue, the court found that Petitioners could not show a genuine issue as to at least one element of

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[1] Petitioners have included the court of appeals' opinion in *Bair v. Hagans*, No. 14-95-00316-CV, 1997 WL 280451 (Tex. App. – Houston [14th Dist.] 1997, pet. denied) (unpublished) as Appendix A (App. A) to their petition.

[2] Petitioners did not include footnote 1 to the *Bair* opinion in their attached Appendix.

malicious prosecution – damages – and therefore affirmed the trial court's grant of summary judgment against Petitioners. App. A, at *4. The petition mentions this point only in support of the unfounded contention that Texas appellate courts frequently rely on waiver to dispose of all but the most unmeritorious points, "in an effort to avoid an obvious due process violation. . . . " Pet. at 21-22.

B. The petition misrepresents the nature of Petitioners' flagrant disregard for the Texas Rules of Appellate Procedure and unfairly shifts blame to the district clerk.

Petitioners represent that their appellate brief "met all the requirements of Rule 74 of the Texas Rules of Appellate Procedure *except that it had limited cites to the transcript on appeal.*" Pet. at 12 (emphasis added). Elsewhere, Petitioners emphasize that the deficiencies in their brief were "limited to a single violation of a subsection of one of the Court's rules" (Pet. at 16) and that "they were in substantial compliance with the rules." Pet. at 18. Nothing could be further from the truth. One need only read the court of appeals' opinion to appreciate Petitioners' inexcusable failure to comply with the rules of appellate procedure:

- "In the entire preliminary statement and procedural history section of their brief, [Petitioners] include only one citation to the record. In fact, the one record citation included in this section does not refer us to summary judgment proof, but to exhibits

attached to [Petitioners'] pleadings in this case. . . . " App. A, at *3.

- "In the twenty page section of [Petitioners'] brief that attacks the summary judgments granted as to [Petitioners'] causes of action, they provide little additional reference to the record." *Id.*
- "[Petitioners] divided this section into eight subsections, based on various causes of action. Five of these subsections . . . contain no citations to the appellate record whatsoever." *Id.*
- "Another subsection, dealing with [Petitioners'] claims of civil conspiracy, contains only a single citation to the record – the same letter cited in the general statement of facts." *Id.*
- "Still another subsection, addressing claims of tortious interference with contract, fails to cite any legal authority." *Id.*
- "This court granted [Petitioners] four extensions of time to file their brief (a total of 210 days) and also allowed an amendment to their original brief. *The amended brief did not remedy the inadequacies of the first.*" *Id.* (emphasis added).

Thus, the flaws in Petitioners' brief were far more than mere technical oversight. Pet. at 16-17. Instead, they were fundamental deficiencies that made Petitioners' arguments impossible to evaluate or analyze.[3]

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[3] Petitioners argue that their briefing failures were somehow harmless, "[s]ince the appellate court must make a

Unable to justify their egregious conduct, Petitioners prefer to scapegoat the district clerk. Throughout their petition, Petitioners blame the district clerk for "losing" the record and dramatize the "nightmare" of recreating that record for appeal. Pet. at 6-8, 12-14, 16-17, 21, 24-26. Any nightmare, however, was of Petitioners' own making.

The original four-volume transcript in this case was filed on March 22, 1995. After receiving four extensions (none of which, incidentally, was sought on the basis of the condition of the record), Petitioners had until October 4, 1995 to file their brief. Yet, Petitioners did not move to supplement the record until March 4, 1996 – *after* Respondents had filed their briefs pointing out Petitioners' deficient record cites.

The court granted every request made by Petitioners to supplement the record, and twice allowed Petitioners extensions to do so. The sum of all this activity was that, when Petitioners filed their *amended* brief on June 21, 1996, there were twelve volumes of transcript on file. Yet, Petitioners (1) still failed to include adequate record cites in their amended brief, and (2) now have the effrontery to

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full review of the entire record regardless of the number of citations contained in the brief on appeal." Pet. at 19. Petitioners misunderstand the nature of appellate review. Courts of appeal are not required to "independently search the statement of facts in an attempt to determine if the grounds of recovery have merit" nor to "search the record for evidence supporting a litigant's position under particular points of error. . . . " *Most Worshipful Prince Hall v. Jackson*, 732 S.W.2d 407, 412 (Tex. App. – Dallas 1987, writ ref'd n.r.e.); *see Saldana v. Garcia*, 285 S.W.2d 197, 201 (Tex. 1955).

tell this Court that "the transcript was largely *non-existent* at the time the original brief, *and even the later allowed amended brief*, was due to be filed." Pet. at 17 (emphasis added).[4] There was simply no relationship between the state of the record on appeal and Petitioners' failure to comply with the most fundamental rules of appellate procedure. In any event, the court of appeals expressly stated that it was not reaching the question whether there was any waiver based on inadequacies in the record.

C. The petition misrepresents the nature and disposition of the Bill of Review proceeding.

Although collateral to Petitioners' constitutional arguments, Respondents must correct Petitioners' misrepresentations regarding the underlying Bill of Review proceeding. Petitioners make numerous unsupported claims regarding the manner in which the jury tampering evidence on which the Bill of Review was based came to light. Pet. at 9-11. Respondents strongly disagree with Petitioners' allegations (1) that special prosecutor Tom Alexander and Respondent Clyde Wilson exceeded their

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[4] As yet another excuse for failing to adequately cite the record, Petitioners argue that they were required to file their amended brief on June 21, 1996, but that "the bulk of the supplemental record and lost documents were not gathered, authenticated and made available for citation until *August* of that same year." Pet. at 13. This is pure fantasy. Plaintiffs filed only *four* of the sixteen volumes of supplemental transcript on August 19, 1996 (after the amended brief had been filed), and, moreover, all of the documents contained in that filing could also be found in earlier filings, all of which were available to Petitioners when they filed their amended brief.

authority in investigating the jury tampering allegations; (2) that Alexander, Wilson, or Respondent Sewell & Riggs violated confidentiality or privilege in obtaining or disclosing such information; (3) that any of the information discovered by Alexander regarding alleged jury tampering by John O'Quinn was "false," "concocted" or "intentionally fabricated"; (4) that Respondent Wilson "extorted" information or suborned false testimony from any witnesses; and (5) that Respondent Sewell & Riggs harbored any improper motive in bringing the Bill of Review proceeding. These accusations are so outlandish that Respondents can only state that they are both unsupported and unsupportable.

Petitioners also egregiously misrepresent the disposition of the Bill of Review proceeding. Although Petitioners insinuate that the trial court "found" the Bill of Review lacking in merit, there was never such a "finding." Pet. at 11, 18. Indeed, because the parties *agreed* to dismiss[5] the Bill of Review in conjunction with the settlement of the underlying stock fraud action, there never was a trial on the allegations of jury tampering contained in the Bill of Review. The letter which Petitioners rely on (Pet. at 11-12, 18) contained the *personal* views of the trial

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[5] The trial court's take-nothing judgment on the Bill of Review was entered in accordance with the parties' settlement; the judgment specifically provides that "a compromise and settlement of the prior judgment . . . has been negotiated and agreed upon and that as a *part of the compromise and settlement agreement the parties expressed their desire that the Court dismiss this Bill of Review proceeding.*" (Emphasis added.) Therefore, that "dismissal" cannot be taken as any ruling whatsoever on the allegations of jury tampering in the Bill of Review.

judge, made without the benefit of any evidentiary hearing. Such a letter did not constitute a "ruling" or a "finding" regarding the Bill of Review proceeding. *See Goff v. Tuchscherer*, 627 S.W.2d 397, 398-99 (Tex. 1982) (a letter from the trial court is not the equivalent of a signed judgment). In any event, the First Court of Appeals of Texas did not share the trial judge's dim view of the Bill of Review proceeding: the First Court had previously observed that the allegations in the Bill of Review "[gave] rise to serious concern about whether there were improper communications with and undue pressure placed on the jury, both before and after verdict." *Voskamp v. Arnoldy*, 749 S.W.2d 113, 127 (Tex. App. – Houston [1st Dist.] 1987, writ denied) (on rehearing). Indeed, the First Court encouraged Respondents to bring the Bill of Review proceeding in the trial court. *Id.* at 127-28 ("[T]he contentions advanced should properly be resolved by appropriate bill of review proceedings, where evidence may be presented and a thorough factual determination made."). Because of the settlement, no "factual determination" was ever made on Respondents' Bill of Review, and Petitioners mislead this Court by representing otherwise.

Finally, Petitioners erroneously imply that the pendency of the Bill of Review damaged Petitioners by preventing them from executing on the underlying stock fraud judgment. Pet. at 12. Yet again, Petitioners obscure the truth. Before the court of appeals rendered a final judgment in *Voskamp, supra,* (and therefore while the appellate court retained exclusive jurisdiction over the case), Petitioners scheduled a hearing for entry of judgment in the trial court. The appellate court entered an

injunction simply to protect its own jurisdiction. The injunction therefore had nothing to do with the Bill of Review proceeding. Furthermore, Petitioners had signed an agreed order in the *Voskamp* suit which prevented enforcement of the judgment for 120 days, a period ending roughly a month after the issuance of the appellate court's mandate. App. A, at *4. When this agreed period ended, Petitioners were free to execute on their judgment, upon ten days' written notice to Respondents. *Id.* Thus, Petitioners' inability to execute on the stock fraud judgment was, likewise, completely unrelated to the Bill of Review proceeding.

REASONS FOR DENYING THE WRIT

The decision of the Fourteenth Court of Appeals of Texas involved the reasonable exercise of the appellate court's discretion in the face of repeated and inexcusable infractions of the Texas Rules of Appellate Procedure. Petitioners' arguments fail to raise an issue of federal law and their petition therefore does not warrant review by this Court.

A. Petitioners' erroneous "death penalty" argument does not raise an issue of federal law. (Pet. 14-24)

Petitioners quarrel with the Fourteenth Court's discretionary finding that Petitioners waived many of their points on appeal by committing flagrant violations of the briefing requirements contained in the Texas Rules of Appellate Procedure. Pet. at 14-24; App. A, at *2-3. Yet

none of Petitioners' misleading and erroneous arguments raises a federal question. This Court should therefore deny the Petition and expend its resources elsewhere.

Petitioners attempt to concoct a constitutional issue by arguing that the court of appeals' disposition constituted an abusive application of "death penalty" sanctions which deprived Petitioners of due process of law. Pet. at 14-15. Petitioners omit one key point, however: *no "death penalty" sanctions were applied to Petitioners' appeal.* Instead, the appellate court found that, after multiple opportunities to supplement the record and even after a chance to *amend* their brief, Petitioners simply failed to support their contentions with adequate record citations. App. A, at *3. At this point, the appellate court was fully within its discretion in holding that Petitioners had waived those unsupported points. App. A, at *2; *see also* Tex. R. App. P. 74(f), (o), (p) (currently Tex. R. App. P. 38.1(d), (f), (h); 38.9(a)), *and Fredonia State Bank v. General American Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994).

This Court has recognized that "the State certainly affords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule" and that "[t]he same rationale applies to the forfeiture of an appeal." *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). *See also Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-51 (1909). Petitioners were afforded their right to appeal "at a meaningful time and in a meaningful manner" when the appellate court granted them more than 210 days of extensions and an opportunity to rebrief. *Thomas*, 474 U.S. at 155; *Armstrong v. Manzo*, 380 U.S. 545,

552 (1965). But Petitioners repeatedly ignored the fundamental rules of briefing, even though Respondents objected to Petitioners' initial brief on the grounds of inadequate record cites and thereafter provided Petitioners with copies of missing documents. As demonstrated above, Petitioners' complaints about the district clerk are a feeble attempt to hide their own inexcusable negligence. *See* pp. 5-6, *supra*.

By failing to file even a minimally sufficient brief, Petitioners "intentional[ly] relinquished" their right to appellate review of the unsupported points of error. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The court of appeals reasonably and correctly exercised its discretion in refusing to allow a *second* rebriefing of the unsupported issues. That decision does not implicate an issue of either federal or constitutional law and should therefore not concern this Court.

B. Petitioners cannot blame the district clerk for their own flagrant disregard for the Texas appellate rules. (Pet. 24-26)

Petitioners' "Point 2" (Pet. at 24-26) essentially revisits the arguments made in their "Question 1" (Pet. at 14-24). Respondents again observe that the court of appeals' dismissal of the majority of Petitioners' points of error was based on waiver, and not on the insufficiency of the record itself. *See* pp. 2-3, *supra*. If, in drafting their appellate brief, Petitioners found inadequacies in the record, Texas law provided mechanisms for supplementing the record and for substituting copies for lost or inaccessible documents. *See* Tex. R. App. P. 50(e), 55(b)

(current version in Tex. R. App. P. 34.5(d), (e)). In fact, Petitioners took advantage of these procedures, and, with the assistance of Respondents' counsel, amassed a voluminous appellate record. Yet, Petitioners' appellate brief simply failed to reference that record sufficiently and, after a wasted opportunity to cure the deficiency, consequently waived the unsupported points. Again, Petitioners' attempt to scapegoat the district clerk does not create a federal issue appropriate for this Court's certiorari review.

C. Petitioners' vagueness argument defeats itself and fails to raise a constitutional issue. (Pet. 26-28)

Petitioners' vagueness argument is incomprehensible and internally inconsistent. Pet. at 26-28. Moreover, Petitioners present no case law in support of their contentions. Petitioners claim that Texas Rule of Appellate Procedure 74(f) (current version in Rule 38.1(h)) is unconstitutionally vague because it "provides little or no clear guidance as to what is required before a litigant's cause of action can be dismissed based on his failure to adequately brief the points on appeal." Pet. at 27. Yet, immediately following that assertion, Petitioners disprove their own argument by citing to Texas Rules of Appellate Procedure 74(p), 83, and 74(o), rules which provide "guidance as to the appropriate actions of an appellate court when faced with what [it] consider[s] to be inadequate briefing." *Id.* Petitioners received every indulgence contemplated by the rules and inexplicably failed to support their asserted errors with adequate record citations.

As Petitioners themselves point out (Pet. at 27), the rules of appellate procedure (1) allow a court of appeals to order rebriefing should a brief "flagrant[ly]" violate the rules; (2) mandate that a court of appeals allow a "reasonable time to correct or amend" briefing inadequacies that amount to mere "defects or irregularities, in appellate procedure, either of form or substance"; and (3) mandate that a court of appeals allow a brief to be "amended or supplemented" should the court strike or refuse to consider any part of a brief. Tex. R. App. P. 74(p), 83, 74(o) (current version in Tex. R. App. P. 38.9, 44.3, 38.7). By granting Petitioners multiple extensions for filing and for record supplementation, and, most importantly, by granting Petitioners the opportunity to rebrief, the court of appeals gave Petitioners every chance the appellate rules contemplate. Petitioners can find "vagueness" in the rules only by erroneously reading into them the requirement that an appellate court allow a *second* rebriefing of the issues. There simply is no such requirement.

Petitioners have not cited a single state or federal case holding that briefing requirements such as those in the Texas Rules of Appellate Procedure are unconstitutionally vague.[6] The rules at issue here, both on their face

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[6] Indeed, accepting Petitioners' arguments would require invalidation on vagueness grounds of Federal Rule of Appellate Procedure 28(a)(6) ("The argument must contain the contentions of the appellant . . . with citations to the authorities, statutes, and parts of the record relied on.") and Supreme Court Rule 24(1)(i) ("A brief . . . shall contain . . . [a] concise statement of the case . . . with appropriate references to the joint appendix . . . or to the record."), because arguably neither rule is

and as applied, gave Petitioners clear notice of their appellate brief's shortcomings. Moreover, in response to Petitioners' original brief, Respondents filed briefs setting forth in painstaking detail why Petitioners' record citations were inadequate and resulted in waiver of the unsupported points. Petitioners' *amended* brief was prepared in light of all this, and still failed to cure the deficiency. App. A, at *3 ("The amended brief did not remedy the inadequacies of the first."). The rules are not unconstitutionally vague simply because they did not explicitly inform Petitioners that utterly disregarding them *a second time* would result in waiver.

D. Petitioners waived their jury trial argument and, in any event, the Seventh Amendment does not apply. (Pet. 28-30)

Finally, Petitioners claim that, because the trial and appellate courts improperly resolved disputed fact issues on motion for summary judgment, Petitioners were therefore deprived of their Seventh Amendment right to a jury trial. Pet. at 28-30. Petitioners did not raise this constitutional issue at trial and have therefore waived it, as the court of appeals correctly held. App. A, at *5. *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945). Petitioners were

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as specific as the Texas rules regarding remedies for briefing deficiencies. *See also* Sup. Ct. Rule 14(4) ("The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny the petition.").

fully capable of presenting this issue to the trial court, notwithstanding their bizarre contentions to the contrary. Pet. at 30. Furthermore, in order to create a constitutional issue, Petitioners ground their claim on the Seventh Amendment. The Seventh Amendment, however, "has not been made binding on the states. . . . " 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2301, at 14 & n.14 (1995), citing *Chicago, Rock Island & Pac. Ry. Co. v. Cole*, 251 U.S. 54, 56 (1919). Thus, even had Petitioners preserved it, their claim would not raise a constitutional question appropriate for certiorari review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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